

## *a Growing Nemesis...*

### **Employee Retaliation Claims**

When the plaintiff attempted to teach his seventh-grade students a more comprehensive view of European history, including various Eastern Hemisphere influences on European culture, he was reprimanded by the school's administrators and warned to stick to the curriculum guidelines. The guidelines, the plaintiff alleges, emphasize a historically limited, religiously biased, and out-of-date view of European civilization. The northern Maine teacher was given written warnings when he failed to follow those guidelines and was ordered to "cease and desist at the peril of losing his job."

U.S. District Court in Bangor against the school district. The lawsuit requests unspecified compensatory and punitive damages and a ruling that will permit the plaintiff to teach the history of European civilization inclusive of all Western and Eastern Hemisphere and Christian and non-Christian influences.



The plaintiff filed a lawsuit in November 2003 in

The lawsuit alleges the school district violated the plaintiff's First Amendment right of free

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## **School Hazards and Incidents**

### **DOL Statistics**

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*Private school administrators and loss prevention personnel often seek external data to help establish, guide, or measure their internal risk control programs. The Department of Labor provides two good indicators that can be used for guidance and as benchmarks. The first are compilations of OSHA citations, which can serve as a beacon to commonly found safety and fire deficiencies. The second set of indicators contains Bureau of Labor incident statistics that can be useful in measuring the relative success of specific loss prevention programs.*

#### **OSHA Violations**

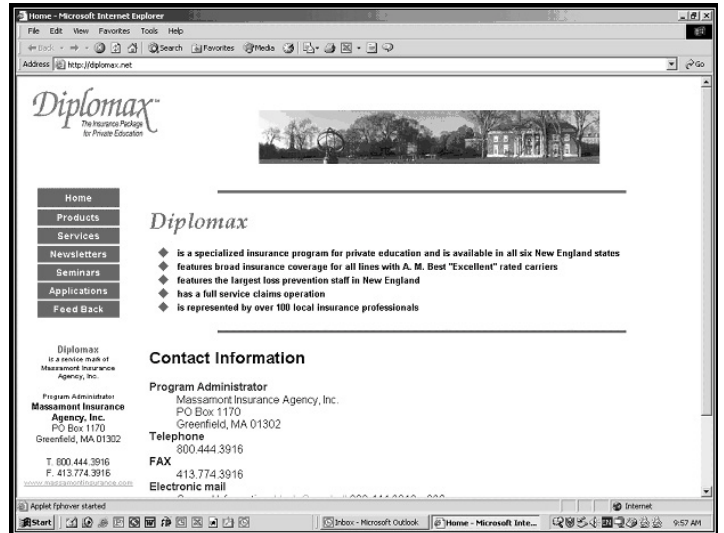
The Occupational Safety and Health Administration and state agencies that have similar jurisdiction conduct random and planned inspections of workplaces to ensure employee safety and health. Often, as is the case with most schools, the inspection is the result of an employee or union complaint. By correcting deficiencies, schools can reduce injuries to employees and non-employees, e.g., students, contractors, and guests.

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# Happenings!

**http://Diplomax.net** is the place to go for:

- Information concerning property and casualty insurance coverages for private schools.
- Seminar information
- On-site Loss Prevention Training
- Archives of ADVANTAGE
- Applications for all lines of casualty and property insurance
- Upcoming events



**AISNE**  
**Spring Business Conference**  
April 28-29, 2004  
Westborough, MA

*Bill Stephenson of The Chestnut Hill School  
with David Winship of the Diplomax  
Program at the recent AISNE trade show.*

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# ADVANTAGE

## Retaliation Claims, cont'd

expression, “his students’ First Amendment rights to the free flow of information within the classroom” and “constitutes an illegal establishment of religion in violation of the First Amendment.” The complaint further states that the required text excluded discussion of ancient Greece’s influence on European culture, the breakup of the Soviet Union (the textbook is titled “Europe and the Soviet Union”), or the effect of Judaism, Islam, and Asian cultures on European development. The school district denies the allegations and asserts economic reasons for keeping the out-of-date textbook.

The case has its origins in the late 1990s. After receiving warnings to follow the curriculum several years ago, the plaintiff filed complaints with the Maine Human Rights Commission and received a “right to sue” letter. The commission reportedly never investigated the complaint.

Within four months of filing his lawsuit, the teacher was put on paid administrative leave. According to his Bangor attorney, “If one sues a school district and suddenly finds a more hostile working environment, I think a causal link between the two can easily be inferred.”

This case has ramifications for all schools and all employers because, aside from the First Amendment issues, the facts have the fundamental elements of an employee retaliation complaint.

### What Are Employee Retaliation Lawsuits?

Employment-related retaliation claims are rapidly becoming commonplace and vexing. These claims

typically arise when employees believe they are being unfairly treated, harassed, discriminated against, or terminated because of an earlier employment complaint they had made or testimony they had given against their employer or another employee, either on their own behalf or on behalf of other employees or the government.

The Equal Employment Opportunity Commission (EEOC) registered 22,768 cases of employee retaliation in FY 2002 and 22,690 cases in FY 2003. These cases represent 27.5% of all EEOC claims filed in the last two years, more than double the filings of a decade earlier. Besides Title VII and age discrimination (ADEA) claims, retaliation cases are associated with several employment and business laws including the Occupational Safety and

Health Act (OSHA), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA) and the Sarbanes Oxley Act on financial disclosures.

Various state and federal laws containing provisions against employee retaliation provide for both compensatory and punitive damages. This seems only fair as it protects workers from retaliation when they protest unfair and illegal labor practices, illegal activities, or fraud.

However, some plaintiffs may be abusing the system. For example, an employee who is eligible for a promotion but doesn’t believe he or she will get it, may make a complaint over an alleged or non-existent discrimination issue; then, when that employee fails to get the promotion, he or she files



**“If one sues a school district and suddenly finds a more hostile working environment ... a causal link between the two can easily be inferred.”**

*Plaintiff's Attorney*

## School Hazards and Incidents, cont'd

As an aid to school risk managers and loss prevention personnel, we have included below the recent violations cited by federal, Connecticut and Vermont OSHA officials (Table I). These inspections took place in the twelve-month period between October 1, 2002, and September 30, 2003.

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**Table I Safety Violations Cited by Federal OSHA,  
Connecticut OSHA and Vermont OSHA  
All Schools (SIC 8200)**

| Description                                     | Regulation       | Federal Citations | CT & VT Citations* |
|---|------------------|-------------------|--------------------|
| Bloodborne pathogens                            | 29 CFR 1910.1030 | 17                | 5                  |
| Asbestos  | 29 CFR 1926.1101 | 13                |                    |
| Portable fire extinguishers                     | 29 CFR 1910.157  | 8                 | 7                  |
| Fixed stairs                                    | 29 CFR 1910.24   | 5                 | 2                  |
| Hazard communication                            | 29 CFR 1910.1200 | 5                 | 22                 |
| Excavations, general requirements               | 29 CFR 1926.651  | 4                 |                    |
| Walking & working surfaces                      | 29 CFR 1910.22   | 3                 | 1                  |
| Personal protective equipment                   | 29 CFR 1910.132  | 3                 | 4                  |
| Electrical – wiring, components, equip't.       | 29 CFR 1910.305  | 3                 | 10                 |
| Lead (29 CFR 1926.62 or 1910.1025)              | See description  | 3                 | 2                  |
| Employee emergency & fire prevention plans      | 29 CFR 1910.38   | 2                 | 3                  |
| Respiratory protection                          | 29 CFR 1910.134  | 2                 | 5                  |
| Medical services & first aid                    | 29 CFR 1910.151  | 2                 | 2                  |
| Construction - safety training & education      | 29 CFR 1926.21   | 2                 |                    |
| General duty clause                             | OSHAAct: 5A1     | 2                 |                    |
| Means of egress, general                        | 29 CFR 1910.37   | 1                 | 5                  |
| Control of hazardous energy – lockout/tagout    | 29 CFR 1910.147  | 1                 | 1                  |
| Machines – general requirements                 | 29 CFR 1910.212  | 1                 | 5                  |
| Electrical systems design                       | 29 CFR 1910.303  |                   | 9                  |
| Exposure to lab chemicals                       | 29 CFR 1910.1450 |                   | 7                  |
| Spray finishing – flammable/combustible mat'ls. | 29 CFR 1910.107  |                   | 6                  |
| Supplementary records                           | 29 CFR 1904.4    |                   | 2                  |
| Flammable & combustible liquids                 | 29 CFR 1910.106  |                   | 2                  |
| Sanitation                                      | 29 CFR 1910.141  |                   | 2                  |
| Abrasive wheel machinery                        | 29 CFR 1910.215  |                   | 2                  |
| Guarding floor & wall openings                  | 29 CFR 1910.23   |                   | 2                  |
| Electrical wiring design & protection           | 29 CFR 1910.304  |                   | 2                  |

\* All but 5 of these citations were by State of Connecticut officials.

Note: The following items were cited only once (federal or state): portable wood ladders, fixed ladders, manually propelled ladders/scaffolds, means of egress (general requirements), occupational noise, compressed gases, hazardous waste operations, asbestos, excavation - protective systems, mechanical power-transmission apparatus, woodworking machinery, and portable power tools/equipment.

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Employees must show a good faith belief of discrimination; they need not prove there was discrimination.

## Retaliation Claims, cont'd

a retaliation claim alleging that his or her failure to be promoted was primarily based on the discrimination complaint.

Retaliation complaints may succeed even if the underlying discrimination case is denied. If the plaintiff can show that:

- ★ the employee engaged in a protected employment activity — such as filing a complaint with the EEOC or testifying on behalf of another employee in a discrimination lawsuit;
- ★ the employer took adverse employment action against the employee after the employee engaged in a protected employment activity;
- ★ the employer knew that the employee had engaged in that protected activity before taking such adverse action; and
- ★ there is a causal connection between the adverse employment action and the protected activity, then there is a very good chance that the plaintiff will succeed with the retaliation claim.

An adverse employment action may take the form of a poor performance review, change of shifts, disparate removal of previously granted rights with no explanation, reduction in pay, denial of a request for education funds, reduction in overtime, suspension, termination, or other proceedings with negative employment implications.

Plaintiffs need only prove that they were retaliated against because they had, in good faith, filed a complaint, testified, or otherwise gave witness to some alleged employer misdoing. It isn't necessary for the underlying, alleged discrimination or other wrong to be proved in a court of law.

If the employee filed a discriminatory action or otherwise acted against the employer's interests, and did so in the belief that the employer had committed a violation of his or her legal rights or of federal or state law (e.g., whistle blower laws), and the employer thereafter took adverse employment action against the employee, the adverse employment action itself is sufficient to go forward with a retaliation claim. Defendant requests for summary judgment are seldom granted in such cases. Furthermore, the courts have been reluctant to grant summary judgment in favor of the defendant in retaliation claims because there is usually a dispute of facts, and, hence no stipulation.

Because of the difficulty in defending retaliation claims, especially if there are only few days or months between the original employee complaint and the alleged act of retaliation, employers may, and often do, settle out-of-court. Employers worry that juries will be more sympathetic to employees than to employers, that the employer will have little or no influence over the amount of punitive damages, and that a trial will generate negative publicity or encourage other retaliation lawsuits.

### What Can Employers Do?

Employers can best treat this exposure by being proactive. Talk to your risk manager and counsel about strategies. Prepare and issue a no-tolerance, non-retaliation policy and institute periodic management training programs. Educate all supervisors and managers to be objective, non-discriminatory, and specific when taking action against an employee or passing over

Some retaliation suits may be setups.

**EMPLOYER, BEWARE!**

**School Hazards and Incidents, cont'd**

**Occupational Illnesses and Injuries**

The Bureau of Labor Statistics, U.S. Department of Labor, reports the number of non-fatal workplace injuries and illnesses on a fiscal year basis, beginning October 1. Table II depicts occupational injury and illness incidents for FY 2001 and FY 2002 for elementary and secondary schools (Standard Industrial Classification 821).

|                                  | <b>Incidents</b> | <b>Incidents</b> | <b>Incident<br/>Rate<br/>per 100<br/>Employees</b> | <b>Incident<br/>Rate<br/>per 100<br/>Employees</b> |
|----------------------------------|------------------|------------------|--|--|
| <b>Description</b>               | <b>2001</b>      | <b>2002</b>      | <b>2001</b>  | <b>2002</b>  |
| Total recordable cases           | 13,600           | 14,800           | 3.4  | 3.7  |
| Lost workday cases               | 5,500            | 7,400            | 1.4  | 1.85   |
| Cases with days away from work   | 4,200            | 4,500            | 1.0  | 1.1  |
| Job transfers or restricted work | 0                | 0                | 0  | 0  |
| Other cases                      | 8,100            | 7,400            | 2.0  | 1.85   |

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**Retaliation Claims, cont'd**

an employee for a promotion. Consider establishing a review panel to approve any disciplinary or promotional activity before the action is taken, or an appeals panel once action is taken if permitted by union contract and labor laws. Create firm guidelines to provide roadmaps for those persons within the organization who investigate employee complaints to ensure that all complaints are thoroughly checked and analyzed, and that investigations are fair and impartial.

Sometimes it is difficult to create an appropriate forum to hear an employee's complaint. Certainly the person accused of discrimination or an unfair or illegal employment practice, such as the complainant's supervisor, is not the proper person to whom the complaint should be addressed for resolution. Any person designated to hear an

appeal or complaint must be free to render impartial judgment.

In the case of the teacher in Northern Maine, the school district was the party that approved the curriculum and thus was not an impartial party. The only authority beside the courts that was in a position to hear the teacher's complaint against the school district was an agency of the State of Maine. However, that forum, the Human Rights Commission, failed to investigate the complaint, thus the lawsuit. We think everyone would agree that this case should have been resolved amicably several years ago within the school district. Perhaps better communications and more flexibility were in order; but human nature, being what it is, often dilutes common sense efforts.

# ADVANTAGE

## Importance of Full Value Appraisals

Property valuations are an important part of the Diplomax™ insurance program. These valuations may be determined by several different methods. Accurate valuations benefit both the insured and the insurer. The valuations should be based on the following criteria: construction, occupancy, protection, and exposure (COPE). Inaccurate valuations, risk assessments, and reported occupancy could have several undesirable effects.

◇ Diplomax™ property insurance policies are currently written with a maximum aggregate limit. Undervaluing the full replacement value of all property may result in insufficient funds to rebuild facilities and replace contents should there be a catastrophic loss.

◇ Unscheduled property, if not reported within the period stated in the insurance policy, may not be covered for losses. This would include newly acquired, constructed or renovated facilities. Demolished or sold property should also be promptly reported and the aggregate policy limits adjusted accordingly.

◇ Changes in risk and protection may affect premiums. Added fire protection, for example, may, if significant, reduce premiums. It is to your advantage to report improvements, but you should also report any significant changes in exposure.

◇ Changes in occupancy, use, or vacancy may affect premiums and coverage. Report all significant changes promptly to Massamont within the period specified in your insurance policy.

◇ If an under-valuation is corrected in future years, there may be a budget shock when and if the new valuation causes a sudden and substantial rise in premium charges.

◇ If some commercial properties are offered for sale or exchange, the seller may rely on the understated value thus causing a loss for the seller.

◇ Over-valuations, if not corrected, may give rise to undue premiums; taxes, if applicable; or voluntary municipal assessments.

As a minimum, we recommend that all non-residential property be appraised every 3-5 years by an independent, experienced, commercial property appraiser. In the interim years, a desktop valuation analysis of the property may be conducted if there have been no significant changes.

The appraiser should utilize computerized appraisal models that incorporate trending valuation factors. This should be accompanied by a full value, limited scope appraisal for modified or deteriorated properties and for new property components; for example, building additions, new machinery, or new furnishings. Surveys by qualified employees or broker representatives may be conducted to determine which properties, if any, need limited scope appraisals in the interim years.

Private schools should strive to upgrade their properties to the latest building codes. Although this is not always physically or financially feasible, every effort should be made where law and safety are concerned. Since building and fire codes generally require any rebuilt property to be constructed to the latest applicable state and local codes, you should report significant deviations from the codes to us.

To ensure that your property receives favorable premium rate treatment, you should eliminate fire hazards, housekeeping problems, overcrowding, inadequate storage situations, and maintenance problems. Malfunctioning HVAC, pumping, mechanical, and electrical equipment should be fixed as soon as possible.

All loss prevention and maintenance recommendations should be followed or discussed with the reporting authority and the insurer. Rapid resolution may reduce losses and save on insurance premiums, in some cases, substantially. Massamont's *loss prevention specialists* are available to help train our clients on what to look for and how to reduce or eliminate property hazards.



# ADVANTAGE

## School Hazards and Incidents, cont'd

An incident rate (IR) is calculated by multiplying the number of reportable incidents (N) for the year by 200,000 hours and dividing the product by the actual hours worked (H) by all employees. That calculation  $[IR = N \times 200,000 / H]$  creates a rate for 100 equivalent employees. The term “equivalent employees” takes into account part time employees, converting their worked hours into equivalent full time employee hours at a rate of 2,000 hours per full time employee (a hundred such employees equals 200,000 hours, hence that figure in the formula).

The definition of a reportable incident is contained in the Department of Labor’s regulations (29 CFR 1904). Reportable incidents don’t include incidents

that happen to students or others unless they were also employees at the time of the incident, and the injury or illness was work-related.

### Footnotes:

1. The “total reportable” incident rate is the sum of all cases reportable on OSHA Form 300 and includes cases in which there were lost workdays and cases where the employee either lost no time or reported back to work the next day. Incident rates don’t include fatalities.
2. The “lost workdays” incident rate includes those cases in which the employee was out of work, transferred to another job position, given restricted work, or was otherwise unable to perform his or her normal job description because of a job-related injury or illness, excluding the day of the incident.
3. The “days away from work” incident rate involves only those cases in which the employee couldn’t report to the facility because of a job-related injury or illness, excluding the day of the incident.

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